

before the CO's certification determination to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(2) Applications may be amended to make minor changes in the total period of employment, but only if a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the total period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such workers will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

(3) Other amendments to the application, including elements of the job offer and the place of work, may be approved by the CO if the CO determines the proposed amendment(s) are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109. Requested amendments will be reviewed as quickly as possible, taking into account revised dates of need for work locations associated with the amendment.

(e) *Appeal procedures.* With respect to either a Notice of Deficiency issued under paragraph (b) of this section, the

denial of a requested amendment under paragraph (d) of this section, or a notice of denial issued under § 655.109(e), if the employer timely requests an expedited administrative review or *de novo* hearing before an ALJ, the procedures set forth in § 655.115 will be followed.

§ 655.1308 Offered wage rate.

(a) *Highest wage.* To comply with its obligation under § 655.105(g), an employer must offer a wage rate that is the highest of the AEWR in effect at the time recruitment for a position is begun, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.

(b) *Wage rate request.* The employer must request and obtain a wage rate determination from the NPC, on a form prescribed by ETA, before commencing any recruitment under this subpart, except where specifically exempted from this requirement by these regulations.

(c) *Validity of wage rate.* The recruitment must begin within the validity period of the wage determination obtained from the NPC. Recruitment for this purpose begins when the job order is accepted by the SWA for posting.

(d) *Wage offer.* The employer must offer and advertise in its recruitment a wage at least equal to the wage rate required by paragraph (a) of this section.

(e) *Adverse effect wage rate.* The AEWR will be based on published wage data for the occupation, skill level, and geographical area from the Bureau of Labor Statistics (BLS), Occupational Employment Statistics (OES) survey. The NPC will obtain wage information on the AEWR using the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center Web site (<http://www.flcdatcenter.com/>). This wage shall not be less than the July 24, 2009 Federal minimum wage of \$7.25.

(f) *Wage determination.* The NPC must enter the wage rate determination on a form it uses, indicate the source, and return the form with its endorsement to the employer.

(g) *Skill level.* (1) Level I wage rates are assigned to job offers for beginning level employees who have a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of

judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy.

(2) Level II wage rates are assigned to job offers for employees who have attained, through education or experience, a good understanding of the occupation. These employees perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

(3) Level III wage rates are assigned to job offers for employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. These employees perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be an indicator that a Level III wage should be considered. Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as lead, senior, crew chief, or journeyman would be indicators that a Level III wage should be considered.

(4) Level IV wage rates are assigned to job offers for employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees receive only minimal guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have man-

agement and/or supervisory responsibilities.

(h) *Retention of documentation.* An employer filing an *Application for Temporary Employment Certification* must maintain documentation of its wage determination from the NPC as required in this subpart and be prepared to submit this documentation with the filing of its application. The documentation required in this subpart must be retained for a period of no less than 3 years from the date of the certification. There is no record retention requirement for applications (and supporting documentation) that are denied.

§ 655.1309 Labor certification determinations.

(a) *COs.* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC, and the CO(s) in the NPC(s) (by virtue of delegation from the Administrator, OFLC), have the authority to certify or deny applications for temporary employment certification under the H-2A nonimmigrant classification. If the Administrator, OFLC has directed that certain types of temporary labor certification applications or specific applications under the H-2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the NPC(s) will refer such applications to the Administrator, OFLC.

(b) *Determination.* No later than 30 calendar days before the date of need, as identified in the *Application for Temporary Employment Certification*, except as provided for under § 655.107(c) for modified applications, or applications not otherwise meeting certification criteria by that date, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification*. The CO will grant the application if and only if: the employer has met the requirements of this subpart, including the criteria for certification set forth in § 655.107(a), and thus the employment of the H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.